Nos. 90-954, 90-1004

In the

Supreme Court of the United States.

October Term, 1990

ROBERT C. RUFO, et al.,
Petitioners in No. 90- 954

v.

INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

THOMAS C. RAPONE,
Petitioner in No. 90-1004

v.

INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the First Circuit

BRIEF OF PETITIONER THOMAS C. RAPONE

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QUESTIONS PRESENTED

1. When the unconstitutional conditions giving rise to a consent decree have been eliminated, may the district court refuse to modify provisions of the consent decree that exceed constitutional requirements and interfere with local officials' administration of their legal duties.

2. Should a district court addressing modification of a consent decree governing a public institution, such as a jail, apply the flexible standard for public law litigation that has been adopted by most circuits, which emphasizes the effect of changed circumstances on the public interest, or must it apply the stricter standard used by the court appeals?

PARTIES TO THE PROCEEDING

The petitioners are the Mayor of Boston, Massachusetts; Robert C. Rufo, Sheriff of Suffolk County, Massachusetts (No. 90-954); and Thomas C. Rapone, Massachusetts' Commissioner of Correction (No. 90-1004).[1/] The respondents are the inmates of the Suffolk County Jail, a class of persons defined in the district court's order dated June 24, 1971.

In addition, the following parties are inactive respondents: City Council of Boston; Massachusetts' Deputy Commissioner of Capital Planning and Operations; and Massachusetts' Secretary of Administration and Finance.

1/ Pursuant to Rule 35.3, Thomas C. Rapone, now Commissioner of Correction, is substituted as petitioner for George A. Vose.

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DECISIONS BELOW

The opinion of the court of appeals is noted at 915 F.2d 1557 (1st Cir. 1990) (unpublished opinion) and appears in full at Pet. 2a-4a.[2/]

The memorandum and order of the district court appears at 734 F. Supp. 561 (D.Mass. 1990) and at Pet. 5a-14a.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

2/ In this brief, references to the Joint Appendix are designated "A."; references to the Appendix in the United States Court of Appeals are designated "R."; and references to the Appendix to the Petition for Certiorari in 90-954 are designated "Pet."

STATEMENT OF THE CASE

Introduction

This action began in 1971 as a challenge to conditions of confinement at the former Suffolk County Jail, known as the Charles Street Jail, a facility built in 1848, which contained large tiers of barred cells, had defective plumbing and heating, and provided inmates with little privacy or sanitation. See Pet. 25a-34a (district court findings dated June 20, 1973). The old Charles Street Jail did not meet constitutional standards. Pet. 40a. The district court entered orders and a consent decree to rectify the unconstitutional conditions. See, e.g., Pet. 15a-21a, 49a-54a.

Now, however, the Massachusetts Commissioner of Correction and Sheriff

of Suffolk County seek relief from the consent decree, which the district court has applied to the operation of the new Suffolk County Jail, known as the Nashua Street Jail. The new jail was opened in 1990 and is "the most modern correctional facility in the Commonwealth" of Massachusetts. A. 140. The Nashua Street Jail's rooms are arranged in modular groups of no more than 40, with each group built around a large common area. A. 136. Each room has a window to the outside and a door with a window, rather than bars. A. 78. Each climate controlled module contains a day room, a kitchenette, a "quiet room," two counseling rooms, showers, telephones, two televisions, an exercise area, a noncontact visiting room, and a washer and dryer for

personal laundry. A. 78-83, 136. Each modular unit is connected to an outdoor exercise area, and all inmates have access to two libraries and classrooms. A. 136, 201.

The Commissioner and Sheriff seek to modify the requirement of a 1979 consent decree, as modified in 1985, that inmates in the Suffolk County Jail be housed one-per-cell. Requiring one inmate per cell in the Nashua Street Jail, an entirely new facility, exceeds constitutional requirements and unduly interferes with the duty of the Sheriff to operate the jail in the public interest.[3/]

3/ The Commissioner's direct interest in the consent decree stems from the requirement that he accept certain inmates transferred to him when the Sheriff is not able to house in the new

(footnote continued)

Prior Proceedings

Certain inmates of the Charles Street Jail filed the complaint in this

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(footnote continued)

jail all of those committed to his custody. The Commissioner's interest in this litigation is broader, however, because more than half the county jails in Massachusetts are operated under consent decrees or judicial orders, see R. 427, 430, 548, 465, 470, thus impeding his capacity to perform his statutory duty to set standards for county jail conditions. Moreover, the Commonwealth of Massachusetts has a great and direct interest in this litigation because it is the subject of comprehensive consent decrees regarding corrections, Langton v. Johnston, No. 89-2052 (1st Cir. March 22, 1991); mental health, United States v. Commonwealth of Massachusetts, 890 F.2d 507 (1st Cir. 1989); mental retardation, Massachusetts Assn. for Retarded Citizens v. King, 643 F.2d 899 (1st Cir. 1981); public assistance programs, Massachusetts Assn. of Older Americans v. Commissioner of Public Welfare, 803 F.2d 35 (1st Cir. 1986); and affirmative action, Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), vacated 461 U.S. 477, vacated as moot, 716 F.2d 931 (1st. Cir. 1983), vacated 468 U.S. 1206, vacated as moot, 749 F.2d 102 (1st Cir. 1984). These consent

case in 1971. In 1971, the district court (Garrity, J.) certified a class of "inmates of the Suffolk County Jail," and the plaintiffs have been identified in the pleadings solely by that designation since then. The primary defendant in 1971 was Sheriff Thomas S. Eisenstadt, who was succeeded in 1977 by Dennis J. Kearney, who was succeeded in 1987 by Robert C. Rufo.

In 1973, the district court held that conditions under which persons awaiting trial were detained in the old jail were unconstitutional. Pet. 38a-44a, 48a-50a. District Judge Garrity found several specific

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(footnote continued)

decrees substantially restrict State officials' freedom to operate programs and make budgetary decisions.

constitutional violations and concluded that holding more than one inmate per cell in the old jail violated constitutional standards. Pet. 42a-43a. The district court ordered that no more than one inmate be held in each cell of the old jail. Pet. 47a.

The district court also held that the unconstitutional conditions could not be remedied without construction of a new jail. Pet. 40a. The district court in 1973 therefore enjoined the Sheriff of Suffolk County from holding any pretrial detainees in the Charles Street Jail after June 30, 1976. Pet. 48a. The district court and court of appeals extended this deadline several times. A. 32, 44-48.

In the face of a firm closing deadline, the Mayor and City Council of

Boston filed a plan with the district court in September, 1978, for construction of a renovated and expanded Charles Street Jail, after which the district court allowed the old jail to remain open pending completion of the planned construction. A. 59-60.

Consent Decree

On April 9, 1979, the parties, including the Sheriff, inmates, Mayor of Boston, City Council of Boston, and Massachusetts Commissioner of Correction, signed a seven-page consent decree that obligated the defendants to construct a jail in accordance with the September, 1978, plan.[4/] Pet. 15a-22a;

4/ The Commissioner of Correction sought to be dismissed as a party early

(footnote continued)

A. 61-87, 249-259; R. 174-290. The jail described by the consent decree was to be on the site of the old jail and was to include both new construction and substantial renovation of the old jail. A. 68-70.

The consent decree stated that its purposes were to "provide, maintain and operate . . . a suitable and constitutional jail for Suffolk County pretrial detainees"; to allow the Sheriff to continue to house pretrial

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(footnote continued)

in the case. His motion was denied based only on his state law duties to regulate county jails, not on any finding that he had a constitutional duty to inmates. Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1199 (1st. Cir.) cert. denied 419 U.S. 977 (1974).

inmates in the Charles Street Jail pending completion of the new jail; to limit inmates' exposure to unconstitutional conditions of confinement; and to "avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design" of the new jail. Pet. 15a-16a.

The consent decree further stated that the new jail "shall be designed and built according to the standards and specifications contained in" a 110-page architectural program "attached hereto and incorporated in this decree . . .," although the district court could permit departure from the program. Pet. 16a. The 1979 consent decree contained no requirement that only one inmate be held in each cell, but the architectural

program assumed single-occupancy cells. A. 73.

The jail described in the architectural program contained space to house 309 inmates. This population limit was based on projections incorporated in the consent decree which indicated that a capacity of 309 would be adequate for more than 20 years. A. 69. The architectural program projected that the number of inmates committed to the Sheriff's custody would fall from 245 in 1979 to 215 by 1995. Id.

State Court Proceedings

The new jail on Nashua Street was built as a result of state court litigation filed because work on the new jail had not commenced by 1984, five years after the consent decree was signed. In October, 1984, the Sheriff

refused to accept custody of certain pretrial detainees because he could not house additional inmates without violating the 1973 order of the district court limiting occupancy of the Charles Street Jail to one inmate per cell. As a result, the Attorney General of Massachusetts sued the Sheriff in state court seeking an order that the Sheriff accept all the inmates committed to his custody. The Sheriff promptly filed his own action in the same state court against the Mayor and City Council seeking funding for a new jail. R. 302-316.[5/]

5/ The Mayor and City Council, who as Suffolk County Commissioners are responsible for paying for the jail, Mass. Gen. Laws c. 34, §§ 3-4, appealed state court orders that they pay for a new jail. R. 330-334; 350-352. The actual construction costs for the new jail were paid entirely by the Commonwealth of Massachusetts. 1985 Mass. Acts 799.

To resolve the state court case, the parties agreed to the construction of a jail to be located on a new site on Nashua Street. R. 350-352. This plan abandoned the Charles Street Jail site, although that site had been the subject of the architectural program "incorporated" in the 1979 district court consent decree. The Massachusetts Legislature appropriated funds for the Nashua Street project in 1985 Mass. Acts 799.

In February, 1985, the inmates moved in the federal district court to modify the consent decree to allow for construction of the new, larger Suffolk County Jail pursuant to 1985 Mass. Acts 799. A. 88-101. The Sheriff and Commissioner assented to this motion.

The district court (Keeton, J.) found the modification "necessary to meet the unanticipated increase in jail population." He modified the consent decree to allow the capacity of the jail to be increased so long as 1) only one inmate was housed in each cell; 2) the same proportion of cell space to support services is maintained; 3) all modifications were incorporated in an architectural plan; and 4) defendants completed construction of the jail by January, 1990. A. 110-113. The district court's requirement that the sheriff hold only one inmate per cell for the first time applied the assumption of the 1979 architectural program (which described modifications

of the Charles Street Jail) to the new Nashua Street Jail.[6/]

As constructed (and completed in early 1990), the new Nashua Street Jail contains 453 cells. A. 134. The inmates are permitted to spend three quarters of their waking hours outside their cells in common areas, using exercise facilities, watching television, or using a library. A. 143. The Nashua Street Jail provides conditions "superior to those of any other facility" in the Commonwealth. A. 140.

6/ Portions of the district court's order, including the single-celling requirement, were suggested in a draft order provided by the Sheriff. A. 107-108.

Motion for Modification

While the Nashua Street Jail was under construction in 1989, the Sheriff moved in the district court to modify the consent decree to allow him to house two inmates in each of 197 of the 453 cells in the new jail. A. 246-248; R. 73-120. The Sheriff's proposed modification would maintain the amount of total floor space per inmate recommended by the American Correctional Association, and would allow the Nashua Street Jail to meet all other criteria of the Association, save that for cell space per inmate. A. 193-194; R. 992.[7/] The proposed modification incorporates an inmate classification

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7/ The consent decree refers explicitly to American Correctional Association standards. A. 64-65.

system, designed to ensure that inmates who may present a safety problem will be housed alone. A. 143; R. 762-768.

The Sheriff moved to modify the consent decree in 1989 because the number of inmates committed to his custody increased unexpectedly. App. 246-247. The inmate population at the time the Sheriff made his motion was almost 200 inmates per day greater than the average population predicted by the parties in the consent decree. See A. 69, 243. It was nearly 100 inmates per day greater than the average population at the time the inmates moved to expand the size of the jail in 1985. See A. 91, 243.

The increase in the number of inmates committed to the Sheriff's custody has occurred because of an

increase in crime in Suffolk County. A. 114-115, 122-123. The District Attorney of Suffolk County described a "dramatic increase in serious crime" resulting in more arrests and prosecutions. A. 114. The Boston Police increased the number of arrests by more than 20% from 1986 to 1989, leading to a corresponding increase in the number of pretrial detainees, according to the Police Commissioner. A. 122. Most inmates committed to the Sheriff's custody are charged with serious felonies, such as violent crimes and sale of drugs. A. 211-212.

As a result of increased crime, the average number of inmates has burgeoned since 1988. A. 243. From 1985 to 1988, the number of inmates was well below the 405-person capacity planned for the new

jail. The average number of inmates in 1985 was 326 per day, decreasing to 321 per day in 1986, increasing to 370 per day in 1987 (the year construction of the new jail began) and 413 in 1988. Only in mid-1988 did the number of inmates begin to approach the number of available cells. Id. An average of more than 453 inmates per day, the single-celled capacity of the Nashua Street Jail, were committed to the Sheriff's custody in three out of the 24 months in 1988 and 1989. Id.

As a consequence of the order requiring only one inmate to be held in each cell at the Nashua Street Jail, the Sheriff has been required to establish a program to shift dozens of inmates to other jails in Massachusetts, to state prisons, and to facilities providing

alternatives to incarceration. A. 121, 210-213.[8/]

The requirement that the Sheriff shift inmates from the Nashua Street Jail to jails in other counties and to state prisons requires that Suffolk County inmates be held in conditions inferior to those at the new Nashua Street Jail and exacerbates the crowding that exists in other correctional facilities across the Commonwealth. See, e.g., A. 118-120.[9/] The consent

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8/ These measures were taken in addition to other techniques, largely imposed by the state court, designed to cut to the bare minimum the number of persons to be housed at the jail. R. 389-401.

9/ The district court based its 1973 finding that the Charles Street Jail failed the constitutional test in part on the fact that its pretrial detainees

(footnote continued)

decree (and other consent decrees and judicial orders governing jails in other Massachusetts counties) reduce the Commissioner's ability to perform his statutory duty to set standards for county jails. Mass. Gen. Laws c. 124, § 1(d) (1988 Official Ed.).

Because the amended consent decree forbids more than one inmate per cell at the new Nashua Street Jail, many inmates are moved to other counties where they are held two or three-per-cell in smaller cells and in less modern

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(footnote continued)

were kept in poorer conditions than convicted state prisoners. Pet. 35a. Because of severe overcrowding in state institutions in the interim, this situation has been reversed. A. 118-120, 210-212.

facilities than the Nashua Street Jail A. 210-211. Those inmates who are transferred to other counties also generally live farther from their families and attorneys. A. 211. The transfer system, moreover, cost the taxpayers of Suffolk County nearly $1 million in fiscal year 1990 alone. A. 214.

The population-reduction program also effectively permits the release or escape of inmates who have been determined by at least two judges to be in need of pretrial detention. A. 212. In order to reduce the inmate population, the state court requires a judge to review the status of inmates whose bail already has been reviewed and approved twice, and allows the judge to release those inmates on their own

recognizance or to halfway houses. R. 397-401, 778-782. One out of ten of those transferred to halfway houses escape from custody. A. 141. Inmates who escape present a public safety hazard. A. 115, 123-124, 213-214.

Decisions of the District Court and Court of Appeals

The district court denied the Sheriff's motion for modification. Pet. 5a-14a. In addressing the motion, the district court made no reference to the plainly constitutional conditions at the new jail. Rather, it applied the standard for modification in United States v. Swift & Co., 286 U.S. 106, 119 (1932) requiring a "clear showing of grievous wrong evoked by new and unforeseen conditions" in order to grant modification. Pet. 8a. The district

court ruled that the change in law claimed by the Sheriff was insufficient to support modification because no prior precedent on which the district court relied had been overturned since the 1979 consent decree. Pet. 10a. The district court ruled that the change in circumstances claimed by the Sheriff was insufficient because "the overcrowding problem faced by the Sheriff is neither new nor unforeseen," id., although it did not explain how the Sheriff should have been able to predict the increase in crime and in the inmate population.

The district court also purported to address modification under a "flexible standard," as suggested by the Sheriff. The court ruled that even under its interpretation of that standard it would deny modification because "The proposed

modification would violate one of the primary purposes of the decree--to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards." Pet. 12a. The court stated that granting modification in this case would undermine incentives for consent decrees, and that if the Sheriff had to release inmates because the district court denied the modification, the responsibility would lie with "public officials having fiscal authority [who] have chosen not to provide adequate resources." Pet. 14a.

The United States Court of Appeals for the First Circuit affirmed in a four-sentence per curiam opinion, stating that "We are in agreement with the well-reasoned opinion of the

district court and see no reason to elaborate further." Pet. 2a.

SUMMARY OF ARGUMENT

The district court was required to modify the consent decree to permit double-celling because there is no constitutional violation at the new Nashua Street Jail. In the absence of a constitutional violation, there is no predicate for the district court to continue to control the jail's operation and the Sheriff should be allowed to administer the jail in accordance with his public duty as an elected local official. [Pp. 30-41]

The existence of a consent decree in this case did not enlarge the district court's power to control the operation of the jail or justify denial of the

motion to modify. The district court's equitable power cannot extend, even under a consent decree, beyond the limits set by the Constitution and federal law. Nor does the contractual aspect of the consent decree override the many reasons that require the district court to modify the consent decree: there is no remaining violation of federal law; the remedy intrudes upon the sheriff's discretion as a local official; and the remedy fails adequately to take into account the effect of increased inmate population on public safety and the public interest. [Pp. 41-50].

The district court also erred in declining to modify the consent decree to reflect changes in the law regarding single-celling since entry of the decree

in 1979. This Court substantially clarified inmates' rights in Bell v. Wolfish and Rhodes v. Chapman, holding that in circumstances such as those in this case, the district court cannot require the Sheriff to hold only one inmate per cell. [Pp. 50-55]

Finally, the district court erred in refusing to modify the consent decree to address the explosive growth in the number of inmates since 1988. The district court should have modified the decree after weighing the harm to the Sheriff, who is barred from housing the increased inmate population in the new jail; the effect of the single-celling requirement on the public interest, public safety, public fiscal resources, and the inmates themselves; and the terms of the consent decree and

underlying law requiring only conditions of confinement that meet the constitutional minimum. This standard of modification, which has been applied successfully by the majority of circuits, properly balances the need for change and flexibility in institutional reform litigation against the desirability for finality, and preserves incentives to settle litigation. [Pp. 55-75]

For these reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to the district court to modify the consent decree to allow double-celling.

ARGUMENT

I. THE DISTRICT COURT COMMITTED AN ERROR OF LAW IN DECLINING TO MODIFY THE CONSENT DECREE BECAUSE THE NEW JAIL HAS NO CONSTITUTIONAL VIOLATIONS.

The district court erred when it denied the Sheriff's motion to modify the consent decree and chose instead to continue judicial control of important aspects of jail management. The district court should have granted the motion to modify because there is no constitutional violation at the new jail, nor is there any contention that conditions under the requested modification will violate the Constitution.

A. The District Court Was Required To Modify the Consent Decree Because The New Jail Contains No Constitutional Violation.

In the absence of any finding of a current or prospective constitutional

violation at the new jail, there was no basis for the district court to limit the Sheriff's freedom to operate the new jail. Rather, the district court was required to modify the consent decree to permit double-celling.

There is no constitutional violation even alleged at the Nashua Street Jail. The Nashua Street Jail is a "state of the art" jail, the most modern in the Commonwealth. A. 209. It provides spacious, climate-controlled accommodations for inmates, with amenities including televisions, laundry facilities, visiting rooms, individual lockers for inmates' personal belongings, recreation areas, libraries and classrooms. A. 81-83, 136, 198. Inmates are permitted to be out of their cells 12 hours daily to use the 2,000 square foot day room in each modular

unit, the indoor and outdoor exercise facilities, or other facilities. A. 143, 195.

The Constitution imposes no absolute requirement that inmates be housed one per cell. Rhodes v. Chapman, 452 U.S. 337, 348 (1981); Bell v. Wolfish, 441 U.S. 520, 541 (1979). State and local officials may house two pretrial detainees per cell so long as the arrangement is related to a legitimate governmental need and not punishment. 441 U.S. at 539.[10/] Like the jails

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10/ In this case, the district court's 1973 findings that double-celling at the old Charles Street Jail was unconstitutional cannot be applied to the different conditions at the new jail. Moreover, Bell and Rhodes, decided several years after the district court's findings, significantly undermine the district court's rationale for finding double-celling at the old jail unconstitutional per se. Compare Pet. 26a-27a, 42a with 441 U.S. at 541-543, 452 U.S. at 348-350.

in which double-celling was found constitutional in Bell and Rhodes, the Nashua Street Jail is a new jail with cells of approximately 70 square feet. 441 U.S. at 541-543; 542 U.S. at 348-350.[11/]

Because the unconstitutional conditions at the Charles Street Jail have been remedied and are not likely to recur, the district court must allow local authorities to resume control of the new institution -- the predecessor

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11/ The inmates' only contention regarding conditions at the Nashua Street Jail is that the construction of the cell doors raises safety issues. A. 169-173, 184. They have not yet couched this contention in constitutional terms. The Sheriff adequately showed that these doors did not create a safety problem, A. 202-204; R. 300, 694-695, 785-798, and the district court made no finding on the issue.

of which previously had violated federal law.[12/] The district court's power to enter and enforce a consent decree derives solely from the underlying violation of federal law. System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961) (ordering modification of decree to reflect change in underlying statute). "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." Swann v. Charlotte- Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). "[T]he scope of the remedy is determined by the nature and

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12/ This case is unlike United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953), and its progeny because there is no likelihood that defendants will "return to [their] old ways." Thus, in this case there is no mere voluntary cessation of arguably unlawful conduct.

extent of the constitutional violation." Milliken v. Bradley, 418 U.S. 717, 744 (1974) Cf. Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 637 (1991);[13/] Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434 (1976) (when this Court's subsequent decision revealed that the agreed-to remedy went beyond the bounds of relief available from federal courts, the district court was required to amend the remedy to limit its enforcement

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13/ This Court's decision in Oklahoma City substantially undercuts Swift by holding that, when the underlying federal wrong has been corrected, the consent decree must be vacated. 111 S.Ct. at 637. While the defendants have not yet moved to vacate the consent decree in this case, the principle supporting vacation a fortiori supports modification to allow two inmates per cell.

powers to those allowed by federal law).[14/]

Thus, the district court committed an error of law in this case when it declined to modify the consent decree as the Sheriff requested. The district court erred because the constitutional violation underlying the decree has disappeared and will not recur, so there is no constitutional violation to serve as a predicate for the federal court's

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14/ In cases with facts very similar to this case, two courts of appeals ordered modification of consent decrees, in light of the decisions in Bell and Rhodes, so that the remedies under consent decrees would be coextensive with injunctive remedies available from federal courts following trial. Newman v. Graddick, 740 F.2d 1513, 1521 (11th Cir. 1984) (remanded to consider whether conditions of confinement meet constitutional standards, not consent decree requirements); Nelson v. Collins, 659 F.2d 420, 428-429 (4th Cir. 1981)(en banc) (directing district court to modify to allow two inmates per cell).

continued exercise of its equitable power.

B. The District Court Violated Principles of Federalism by Failing to Modify the Decree.

The district court transgressed important constitutional principles of federalism in denying the motion to modify. Federal courts generally are limited to enforcing the Constitution and federal law. Constitution, Art. III, § 2. This limitation has special significance with regard to federal court remedies against state and local officials. See, e.g., Younger v. Harris, 401 U.S. 37, 44 (1971).[15/]

15/ See also, Note, Federalism and Federal Consent Decrees Against State Governmental Entities, 88 Col. L. Rev. 1796, 1802-1812 (1988).

This Court repeatedly has cautioned federal courts to be mindful of their duty, grounded on bedrock principles of federalism, to exercise their equitable powers to minimize interference with the day-to-day workings of state and local governments. See Rizzo v. Goode, 423 U.S. 362, 379 (1976); O'Shea v. Littleton, 414 U.S. 488, 501 (1974). Federal courts must avoid orders that unduly limit state and local administrators' discretion. See Kasper v. Board of Election Commrs. of Chicago, 814 F.2d 332, 338, 340 (7th Cir. 1987)(declining to enter consent decree requiring federal court supervision of local elections); Lelsz v. Kavanagh, 807 F.2d 1243, 1252, reh. denied 815 F.2d 1034 (5th Cir.) cert. dismissed 483 U.S. 1057 (1987)(modifying consent decree to

minimize interference with operations of state facilities for mentally retarded); See also Sansom v. Lynn, 735 F.2d 1535, 1543-1545 (3d Cir.)(Becker, J., concurring) cert. denied 469 U.S. 1017 (1984).

In light of this special sensitivity to local autonomy, this Court also repeatedly has cautioned the lower courts to avoid interference with local operation of jails and prisons. Turner v. Safley, 482 U.S. 78, 85 (1987); Block v. Rutherford, 468 U.S. 576, 584-585 (1984).

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are

> ill equipped to deal with the increasingly urgent problems of prison administration and reform.

Procunier v. Martinez, 416 U.S. 396, 404-405 (1974).

The district court violated those principles by refusing to modify the decree to permit single-celling. State and local officials have complied with the consent decree by building the new jail -- at the expense of the Commonwealth -- and operating it within the confines of the decree, except for this request to modify. By denying the requested modification, the district court has hamstrung the operation of the jail in a manner that threatens public safety and strains the statewide correctional system. The court has interfered unduly with important parts of the operation of a local facility at

which there is no constitutional violation.

C. The Terms of the 1979 Consent Decree Neither Enlarge the District Court's Powers Nor Support Perpetual Single-Celling.

The mere fact that the parties in this case signed a consent decree in 1979 neither enlarges the district court's equitable power nor justifies denial of the motion to modify. The parties could not, by consent, enlarge the district court's equitable powers, because those powers are subject to constitutional limits on federal court jurisdiction and to principles of federalism. "[A] federal court is more than a recorder of contracts from whom parties can purchase injunctions. . ." Local No. 93 v. Cleveland, 478 U.S. 501, 525 (1986) (internal quotation marks

omitted).[16/]

The inmates' argument, if successful, would allow the parties to a lawsuit to determine the scope of the federal courts' equitable jurisdiction. According to the inmates, the district court must enforce a standard of conduct not required by the Constitution merely because that standard is embodied in the consent decree.[17/] The inmates'

16/ See also Note, 88 Col. L. Rev. at 1804.

17/ Commentators have expressed doubt about public officials' power to bind themselves by consent decree to promises they could not otherwise bind themselves to perpetually. Shane, Federal Policy Making By Consent Decree, 1987 U. Chi. Legal F. 241, 267; Rabkin & Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 245 (1987). See also United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977) (State may alter its contractual

(footnote continued)

argument places the consent decree in a superior position to the jurisdictional limitations set by the Constitution and federal statutes.

This Court never has decided that consent decrees authorize federal courts to order state and local entities to perform acts not required by the Constitution or federal statutes. Contrary to the inmates' argument, Local No. 93, 478 U.S. at 525, merely held that a "federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial"

(footnote continued)

obligations unilaterally when "reasonable and necessary to serve the admittedly important purposes claimed by the State.")

(emphasis supplied). This statement only permits the court's entry of a decree consented to by all parties, which the parties agree to follow to remedy an ongoing federal law violation. The Court stated specifically that a stricter standard applies to requests for modifications, id. at 528, and thus Local 93 does not apply in this case. The constitutional violation in this case has been remedied and the governmental defendants have withdrawn their consent, yet the district court seeks to continue to supervise operation of the new jail.[18/]

18/ Courts have held, and commentators have asserted, that judicial power may not be used to enforce consent decrees that go beyond courts' equitable powers. Lelsz, 807 F.2d at 1254;

(footnote continued)

In this case, the district court erred in denying the request for modification, placing undue emphasis on the contractual aspect of the consent decree. Pet. 12a. The district court incorrectly concluded that "The proposed modification would violate one of the primary purposes of the decree -- to

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(footnote continued)

Handschu v. Special Services Div., 787 F.2d 828, 833 (2d Cir. 1986); Alliance to End Repression v. Chicago, 742 F.2d 1007, 1016 (7th Cir. 1984) (en banc); Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983); Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1131 (D.C. Cir. 1983) (Wilkey, J., dissenting) cert. denied, 467 U.S. 1219 (1984); Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19, 39; McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal F. 295, 325.

provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards." Id.

Because modification is a judicial act, the district court must look to its own power, not to the contractual aspect of the consent decree, to determine whether to provide relief. System Federation, 364 U.S. at 651. In this case, the law does not permit the federal court to require single-celling in the absence of a predicate constitutional violation. Also, the terms of the consent decree in this case require the district court to refer to underlying constitutional principles in assessing modification. The consent decree was not designed to provide accommodations that meet agreed-upon

standards, but rather to provide inmates with a "suitable and constitutional jail" based on an architectural program that is "both constitutionally adequate and constitutionally required." Pet. 15a-16a. In this case, the terms of the decree and of the underlying law both dictate that the current constitutional conditions at the new jail should be the basis for the district court's decision on the motion for modification.

The district court improperly gave controlling weight to the contractual aspect of the consent decree, so that every "benefit" for which the inmates "bargained" could never be changed. Id. at 12a. The logic of the district court's position goes much too far, foreclosing any modification that would alter the agreement of the parties in

more than an incidental way and ignoring the equitable aspect of modification. When addressing a proposed modification, the district court is exercising its equitable powers. In that context, the contractual aspect of consent decrees cannot outweigh other important interests inherent in public law litigation.[19/] Here, the most important of these interests is that the constitutional violation underlying the consent decree has been fully cured, so that the decree inappropriately intrudes upon the Sheriff's public duty to manage the jail as he sees fit.

19/ The terms of the decree are relevant to interpretation, United States v. ITT Continental Baking Co., 420 U.S. 223, 236-237 (1975), but much less relevant to modification, Firefighters v. Stotts, 467 U.S. 561, 578-581 (1984).

"The court here failed to recognize that the central goal of the decree is to provide constitutional prison conditions, and instead focused inappropriately on the double-celling provision." Plyler v. Evatt, 846 F.2d 208, 212 (4th Cir.) cert. denied 488 U.S. 897 (1988). "And in considering the impact on the inmates who would be double bunked if the decree was modified, the judge could not properly assign controlling weight to the inmates' preference for single cells: that is, for accommodations superior to those of many and perhaps most inmates in American jails . . ." Duran v. Elrod, 760 F.2d 756, 760 (7th Cir. 1985). The contractual aspect of the consent decree must be weighed with factors such as the increased number of

inmates, changed legal doctrines governing jails, the effects of the consent decree on the democratic process, and the public interest, all factors discussed in more detail subsequently in this brief.

The district court thus erred in denying the motion for modification because the contractual aspect of the consent decree does not broaden the district court's equitable jurisdiction and does not override all other considerations in assessing the modification.

D. The District Court Erred By Failing to Modify the Consent Decree Based on a Change in Law.

The district court also was required to grant the Sheriff's motion to modify the consent decree because of changes in

the underlying law. Since the consent decree was executed in 1979, the underlying law governing constitutional conditions of confinement has changed substantially. Bell v. Wolfish, 441 U.S. 520, and Rhodes v. Chapman, 452 U.S. 337, substantially clarified the law regarding the constitutionality of housing two pretrial detainees per cell.

A significant change in the law underlying a consent decree, which alters the basis of the parties' agreement or the court's authority to enter the decree, justifies modification of a decree. System Federation, 364 U.S. at 651.[20/] Because a court's

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20/ See also Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv.L. Rev. 1020, 1035 (1986) ("Because the Constitution

(footnote continued)

authority for entering the decree springs from the underlying violation of law, the court's authority to enter and enforce the decree is circumscribed by a change in that law. In response to an appropriate motion by a party subject to the decree, the court should modify the decree to reflect that change. Id.[21/]

The limits inherent in federal court treatment of consent decrees were addressed in Pasadena, 427 U.S. at 434,

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(footnote continued)

sketches rights only in general terms and because their content can change in extreme and even unpredictable ways, plaintiffs [and defendants] should not be locked into relief plans that reflect earlier understandings of rights.")

21/ The First Circuit has applied this principle narrowly, requiring that prior law be "directly overrule[d]" to justify modification. Pet. 10a, citing Coalition of Black Leadership v. Cianci, 570 F.2d 12, 16 (1st Cir. 1978).

an action charging that a public school system discriminated on the basis of race. The district court interpreted the agreed remedy to require annual reassignment of students to achieve racial balance. This Court held that the remedy could not require annual student reassignment to achieve racial balance because such a drastic remedy went beyond the bounds announced in Swann, 402 U.S. 1, which was decided after the Pasadena decree was entered. Accordingly, this Court remanded with instructions to modify an agreed remedy which went beyond the permissible scope of federal remedies.

Applying the same principle to this case, the district court lacks the power to require the housing of one inmate per cell at the Nashua Street Jail. The

district court cannot enforce that remedy because it exceeds any remedy available under federal law according to Bell and Rhodes. The consent decree therefore should be modified to reflect that change. See Newman, 740 F.2d at 1521; Nelson, 659 F.2d at 429.

Because of the significant change in law after the entry of the consent decree in this case,[22/] this Court

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22/ In this case, the inmates have made much of the date of the Sheriff's motion to modify, which came ten years after the decision in Bell. See Brief in Opposition to Certiorari at 22. To require parties to move for modification immediately upon a potential change of law, however, would require litigation when none might be necessary. The Sheriff did not move to modify until he knew he needed additional space for inmates. A. 138-139; see A. 243. Public officials should not be required, in order to qualify for modification, to burden the court with anticipatory motions to modify in the absence of an actual need for modification of a decree.

should remand this matter to the court of appeals with instructions to modify the consent decree to conform with current federal law.

II. THE DISTRICT COURT COMMITTED AN ERROR OF LAW BY REFUSING TO MODIFY THE CONSENT DECREE BECAUSE OF THE DRASTIC INCREASE IN INMATE POPULATION.

A. The District Court Was Required To Modify The Consent Decree Based On Changed Circumstances, The Public Interest, The Terms Of The Consent Decree, And Substantive Law.

The district court erred in failing to modify the consent decree because of the significant change of circumstances that has occurred since the consent decree was entered in 1979 and modified in 1985, and in applying the wrong standard for modification. If the Court

does not reverse because there is no constitutional violation at the new jail, as advocated in Argument I, it should reverse the decision of the court of appeals on this ground. In so holding, this Court should determine that consent decrees in cases involving public institutions and programs should be modified when:

> 1) there is a change in circumstances making application of the consent decree inefficient or inequitable;
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> 2) the modification serves the public interest; and
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> 3) the modification does not frustrate the purpose of the consent decree.

The standard is appropriate for modification in "public law litigation" involving the structure of public

institutions or programs.[23/] It properly balances the need to modify public law consent decrees based on changed circumstances, new information and the public interest, against the goal of stability and predictability in settlement of litigation.

This public law standard, which is labeled the "flexible standard" by some circuits, has been in operation in many circuits for more than a decade. See, e.g., New York State Association for Retarded Citizens v. Carey,, 706 F.2d 956, 969 (2d Cir.) cert. denied 464 U.S. 915 (1983); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1119-1120

23/ See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976).

(3d Cir. 1979) cert. denied 444 U.S. 1026 (1980).[24/] At least seven circuits have adopted a standard for modification of public law consent decrees similar to that advocated in this brief. Carey, (2d Cir.); Shapp (3d Cir.); Plyler, Nelson (4th Cir.); Heath (6th Cir.); Duran (7th Cir.); Keith v. Volpe, 784 F.2d 1457 (9th Cir. 1986); Newman (11th Cir. 1986). The standard has proved workable, and no circuit has altered or abandoned the standard after adopting it.

"[F]lexibility is essential to the administration of comprehensive decrees

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24/ In the correctional context, the public law standard has been applied in several cases to allow housing two inmates per cell, despite consent decree provisions that permitted only one inmate per cell. Duran, 760 F.2d 756; Heath v. DeCourcy, 888 F.2d 1105 (6th Cir. 1989); Nelson, 659 F.2d 420; Newman, 740 F.2d 1513; Plyler, 846 F.2d 208.

arising out of complex litigation." Keith, 784 F.2d at 1460. The special character of public law litigation requires a different judicial approach to modification from that used in commercial and personal disputes. Because of the great likelihood of changed circumstances, improved remedial approaches, or unexpected consequences, the standard for modification must allow for relatively easy adaptation, so long as the basic purposes stated in the consent decree are preserved. Public law litigation involves the courts in continuous supervision of the operation of public institutions and programs, and the effectiveness of remedies depends upon the unpredictable future policies of public institutions and actions of

public officials.[25] As the Second Circuit has observed concerning public law litigation,

> judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.

Carey, 706 F.2d at 969 (Friendly, J.).[26]

25/ See Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1102 (1986); Note, Implementation Problems in Institutional Reform Litigation, 93 Harv. L. Rev. 428, 437 (1977).

26/ "The strong possibility that subsequent developments will render institutional reform relief outdated, ineffectual, or counterproductive

(footnote continued)

The public law standard permits modifications in response to unintended effects on identifiable third parties and the general public. In public law litigation, courts must be willing to modify consent decrees when their remedial orders have unexpected effects on nonparties. See Martin v. Wilks, 490 U.S. 755 (1989). In deciding whether to

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(footnote continued)

presents a compelling case for flexibility in modification." Note, 99 Harv. L. Rev. 1034. See also Fiss, The Forms of Justice, 93 Harv. L. Rev. 1, 49 (1979)(remedy "must always be open to revision, even without the strong showing traditionally required for modification of a decree . . . . A revision is justified if the remedy is not working effectively or is unnecessarily burdensome.").

modify, the court must "consider not only the burden of the modification on the plaintiffs, and the benefits of the modification to the county government, but also the benefits and burdens to the public." Duran, 760 F.2d at 759. See also Plyler, 846 F.2d at 213 (both modifying consent decrees to allow two inmates per cell based, inter alia, on public interest).[27/]

The public law standard for modification adequately protects the underlying purposes of the consent decree. The standard allows modification only when it does not frustrate the purposes of the decree,

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27/ See also Jost, 64 Tex. L. Rev. at 1148-1149; Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 104.

thus preserving the essential elements of the parties' bargain while allowing alterations of specific elements of relief the decree may provide. When a district court addresses modification, it should look to underlying substantive law to determine the purpose of the decree. Because modification is a judicial act, and because action by the court must be based in underlying substantive law, System Federation, 364 U.S. at 651, the rights conveyed by law are the best source for determining the purpose of the decree.

B. The Public Law Modification Standard Properly Allows Public Officials to Fulfill Their Duties.

The public law standard for modification of consent decrees gives

proper weight to the responsibilities of elected and appointed executive and legislative officials to fulfill their responsibilities within the confines of constitutional and legislative mandates. The more rigid Swift standard freezes the consent decree, straitjacketing public officials' policy choices, derailing legislative budgetary prerogatives, and disregarding the special responsibilities of elected officers.[28/]

28/ In lengthy cases, public officials currently bound by consent decrees generally were not in office at the time of the consent decree and thus have no direct responsibility for the wrongs to be redressed by it. See, e.g., Newman, 740 F.2d at 1517 (consent decree requiring significant prison reform signed on state administration's last day in office binds successor administration).

The control of public institutions and programs should lie with the public officials who are elected or appointed to operate them; the public law standard permits public officials to retain a measure of control through the process of consent decree modification. It permits public officials to seek modifications when they find methods to solve the problems addressed by the consent decree that are cheaper, more efficient, less disruptive of other governmental functions, or more harmonious with new policies.

Under the Swift standard applied by the First Circuit, public officials will be reluctant to enter into consent decrees because doing so binds them (and their successors) permanently with little chance to modify their

obligations. The Swift standard may lock public officials into outmoded remedies, constrict their choices of policy, and commit them to unnecessary expenditures.

These considerations underlie the United States Department of Justice's self-imposed limitations on entering consent decrees that unduly cede executive policymaking authority or legislative budgetary authority. See Memorandum of Attorney General Edwin Meese III, Department Policy Regarding Consent Decrees and Settlement Agreements, reprinted in Dep't of Justice Manual § 4-2.100A (1987 ed.) reprinted in part at 54 U. S. L. Week

2492 (1986)[29/]

The public law standard avoids the problems of Swift by providing incentives for litigants, including public officials, to settle litigation involving public institutions and programs. When public officials can be

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29/ Commentators have warned of the antidemocratic potential of the consent decree: "It allows one administration to commit its successors to policies they might not otherwise have chosen. And it presents the risk that major policy decisions will be fixed in secret negotiations with small groups of private plaintiffs. . . ." Rabkin & Devins, 40 Stan. L. Rev. at 204 (1987). See also Easterbrook, 1987 U. Chi. Legal F. at 33; McConnell, 1987 U. Chi. Legal F. at 297; Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1294 (1983)(discussing "the problem of defendants who would like to lose" to obtain budgetary resources or policy preferences). Cf. Rhodes, 452 U.S. at 360 (Brennan, J., concurring) (quoting New York City Commissioner of Corrections stating "I look on the courts as a friend" in obtaining prison reform).

certain that consent decrees will be adaptable to change, they will be more amenable to settlement of litigation regarding public institutions and programs. Shapp, 602 F.2d at 1120.[30/] Plaintiffs in public law litigation also retain incentives to settle, because settlement eliminates the risk and cost of trial and, more important, allows the litigants to have significant control over the relief to be afforded them. The ability to shape the remedy gives plaintiffs significant reasons to settle.[31/]

30/ See also Anderson, Implementation of Consent Decrees in Structural Reform Litigation, 1986 U. Ill. L. Rev. 725, 755-756.

31/ See also McConnell, 1987 U. Chi. Legal F. at 307.

The public law standard also protects judicial legitimacy in "institutional" litigation. Judicial credibility is undermined when courts are seen to interfere unduly with the operation of executive programs. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 659 (1982).[32/] Public law litigation often involves the judicial branch in matters generally left to the discretion of executive branch officials

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32/ See also Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 103-105 (1979); Chayes, 89 Harv. L. Rev. at 1314. See Coffin, The Frontier of Remedies: A Call for Exploration, 67 Calif. L. Rev. 983, 988 (1979) (appellate judge in this case admits unusual role of district court and court of appeals in forcing settlement.)

such as prison administration, Duran, Plyler, or operation of mental hospitals, Carey. It also may involve the federal courts in matters generally left to state and local governments. See Milliken, 433 U.S. at 282. Courts are neither expert in these areas nor institutionally well suited to operate institutions normally governed by elected officials.[33/] The public law standard decreases the appearance of illegitimacy because it allows courts to adapt prior consent decrees to meet new realities. Adoption of the public law standard decreases the possibility that courts will be identified as improperly interfering with executive and popular will.

33/ See Diver, 65 Va. L. Rev. at 103-105; Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 398-400 (1978).

C. Under The Public Law Standard, Changes Of Circumstances In This Case Require This Court To Remand With Direction To Modify.

Applying the proper standard, the district court should have modified the consent decree because of the significant change in circumstances, because the public interest is served by the modification, and because the modification preserves the purpose of the consent decree. The increased inmate population must be considered a significant change in circumstances. Inmate populations now and in the recent past are much higher than the projections included in the consent decree and the populations contemplated at the time the inmates moved to modify the consent decree in 1985. Compare A.

243 with A. 69, 91. The parties' mutual assumptions about inmate populations, stated explicitly in the consent decree and in the inmates' 1985 motion to modify that consent decree, proved to be incorrect. See A. 69, 91. To modify the decree as requested by the Sheriff properly would adapt it to these changed circumstances.

The requested modification also protects public safety and the public interest by allowing the Sheriff to incarcerate those inmates whom judges determine should be remanded to his custody prior to trial. If the modification is granted, the Sheriff will have capacity to house nearly 100 more inmates than have ever been committed to his custody in the past. A. 243. He will no longer need to

distribute them to state prisons and other counties' jails, hold them in less secure settings than their classifications warrant, or release them altogether.

The modification the Sheriff seeks also comports with the purpose of the consent decree. The modification makes the consent decree coterminous with applicable law, bringing it into harmony with the limitations on the district court's authority over state and local officials. Also, the modification complies with the terms of decree itself, to "provide, maintain and operate . . . a suitable and constitutional jail for Suffolk County pretrial detainees." Pet. 15a. There is no dispute that inmates housed in the new Nashua Street Jail, with its modern

facilities, will live in circumstances well above the constitutional minimum required by the terms of the consent decree, even after modification.

In this case, modification also is necessary to protect the interests of inmates outside the plaintiff class. Without modification, excess inmates committed to the Sheriff's custody will be held in accommodations significantly less hospitable than if they were held two per cell at the Nashua Street Jail. A. 139-140. If the modification is not granted, excess inmates will continue to be housed two per cell in facilities outside Suffolk County, all of which are older and contain fewer amenities than the Nashua Street Jail, as well as being further from inmates' families and attorneys. A. 139-140, 210-211. The

modification plainly will promote the purpose of the consent decree by providing superior accommodations for those inmates.

The consent decree should be modified because the great increase in inmate population makes compliance burdensome and inequitable for the Sheriff, because the modification promotes public safety and promotes the public interest, and because the modification is consistent with the purpose of the decree -- to provide constitutional conditions of confinement for the inmates. Under the public law standard for modification of consent decrees, this Court should remand this case to the Court of Appeals with instructions to modify the consent decree as requested by the Sheriff.

CONCLUSION

For the reasons stated in this brief, the Court should vacate the decision of the United States Court of Appeals for the First Circuit and remand the case to that court with instructions to direct the district court to modify the consent decree to permit two inmates per cell at the Nashua Street Jail.

Respectfully submitted,

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